



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

HARVARD LAW REVIEW

VOL. XXX

MAY, 1917

No. 7

WAR EMERGENCY LEGISLATION — A GENERAL VIEW

IN the War of 1914 the emergency legislation of the several countries of Europe has covered so many subjects that in case emergency legislation is to be framed in the United States the framers of it will look to recent European models. With us such legislation must pass the tests both of expediency and of constitutionality. My present undertaking is to discuss constitutionality. To that end it is advisable to begin with a brief description of the emergency legislation of Great Britain, then to discuss that legislation in the light of the British system, and finally to test it from the point of view of the Constitution of the United States.

BRITISH WAR EMERGENCY LEGISLATION

The British emergency legislation touches private property in every conceivable way, as it provides for regulating the sale of it or the use of it by the owner, and for taking over the management of it, and for confiscating the title to it, and for destroying it. When the regulation of sale takes the form of fixing prices, the intent is not that the owner shall suffer loss, but simply that he shall not make an unreasonable profit. Similarly, when the management of property is taken over by the government there is no intent that the owner shall suffer a total loss. Also in the case of compensation, at least when the transaction takes the form known to American lawyers as the exercise of the right of eminent domain, there is sometimes, though not invariably, an attempt to give indemnity. Yet beyond

question property owners are suffering losses outside the mere burden of taxation and of war prices; and they are suffering such losses by reason of legislation in a country where legislation has long had as one of its chief purposes the protection of the owner of property.

Nor is the still more highly prized privilege of personal liberty enjoyed as freely as heretofore. Among many restrictions, the resident of Great Britain may not go out freely at night, or have bright lights in his house, or communicate by writing, otherwise than through the mail, with persons in enemy countries or indeed with alien enemies in Great Britain.

Even life itself is not surrounded with the old safeguards of a British jury; for offenders against the emergency legislation may be tried in military tribunals.

This summary indicates the general nature of the restrictions. Later it will be necessary to go into more minute detail.

The items of legislation already given indicate its substance. What is equally interesting is its form. The form is sometimes an Act of Parliament, sometimes a Royal Proclamation, and more frequently a series of Regulations embodied in an Order of the Privy Council or of some other governmental body or official. In comparison with the whole body of emergency documents — covering almost a thousand pages a year — the Acts of Parliament are so slight in bulk as to give to a careless reader the initial impression that by a peaceful revolution in government the King and the Privy Council have largely absorbed the power of Parliament; but even the slightest examination of the documents shows that both the King and the Privy Council, as well as all the other governmental agencies, appreciate that such legislative power as they seem to possess comes through parliamentary authorization or ratification.

As matter of form, then, the legislation usually appears in documents which are not Acts of Parliament. Thus, the chief document has been The Defence of the Realm (Consolidation) Regulations, 1914, covering eighteen pages, issued by the Privy Council under the authorization of the Act of Parliament, only one tenth as long, entitled The Defence of the Realm Consolidation Act, 1914.

Under the British constitutional system there can be no question that the King and the Privy Council cannot, either separately or together, change the law. This has recently been held in *The*

Zamora,¹ — a prize case. Yet it is equally clear that there is no assignable limit to the delegation of legislative power by Parliament. Thus one of the questions naturally arising in the United States is non-existent in Great Britain.

No, in Great Britain the legislative power can be delegated; and thus the question is simply whether Parliament itself has power to make such drastic enactments as those which have been summarized. In Great Britain are life, liberty, and property protected against Parliaments? No. There are, to be sure, Magna Charta (1215), the statute of the 28th year of Edward the Third, Chapter 3 (1354), the Petition of Right (1628), the Habeas Corpus Act (1679), and the Bill of Rights (1689); and each of these famous documents is part of the pedigree of the Constitution of the United States. Yet, whereas the Constitution of the United States restricts legislation and executive and judicial power, these old British enactments do not restrict Parliament.

Magna Charta (1215) limits the executive department alone when it says, as commonly translated:

“No freeman shall be taken or imprisoned . . . or outlawed or exiled or in any way destroyed nor will we go upon nor send upon him, except by the lawful judgment of his peers or by the law of the land.”

Similarly it is a limitation upon the Crown that is in mind when the Statute of 28 Edward III. (1354), says, as usually translated:

“No man of what estate or condition that he be shall be put out of land or tenement nor taken nor imprisoned nor disinherited nor put to death, without being brought in answer by due process of law.”

Again, the Petition of Right (1628) distinctly directs itself against the Crown alone when it quotes the former documents and proceeds to complain of imprisonment by the King, and of billeting of soldiers and sailors, and of the issuing of commissions enlarging the powers of military tribunals.

So, too, the Habeas Corpus Act (1679) is directed exclusively against those having a person in their custody, obviously administrative officials as a rule.

Finally, the Bill of Rights (1689) is frankly nothing but a limitation upon the power of the Crown. The first few of the rights therein declared are worth quoting:

¹ [1916] 2 A. C. 77.

"1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

"2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.

"3. That the commission for erecting the late Court of Commissioners for Ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious.

"4. That the levying money for or to the use of the Crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal.

"5. That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal.

"6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law."

Thus it appears clear that Parliament is under no express limitations regarding legislative power. Indeed, Blackstone, in a familiar passage of his *Commentaries*,² says of Parliament:

"It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power which must in all governments reside somewhere is intrusted by the constitution of these Kingdoms."

Also, in our own time Dicey, in his *Law of the Constitution*,³ has repeated the doctrine and given many illustrations of it.

It is, then, not surprising to find the Court of Appeal in 1915, in the case entitled *In re A Petition of Right*,⁴ holding that under the Defence of the Realm Consolidation Act, 1914, and The Defence of the Realm (Consolidation) Regulations, 1914, the military authorities could, without legal right to compensation, take possession of lands and buildings for securing the public safety and the defence of the realm during the war.

As the British war emergency legislation has been enacted either by Parliament itself or by bodies and officials expressly empowered by Parliament, it is obvious that, for the reasons already outlined,

² 1 BL. COMM. 160.

³ Chapter I.

⁴ [1915] 3 K. B. 649.

the British system of government gives no ground for attacking it in the courts as invalid. It will be found that in the United States the questions are very different.

THE CONSTITUTIONALITY OF FEDERAL WAR EMERGENCY LEGISLATION

Would the British war emergency legislation be valid if adopted by the Congress of the United States?

It has been explained that in form the British legislation is largely composed of regulations promulgated by bodies and officials endowed by Parliament with part of its own unlimited power. The interesting question whether under our Constitution Congress can delegate legislative power to similar bodies and officials will not be discussed at present; and attention will be directed exclusively to ascertaining whether the ground covered in Great Britain can be covered through direct legislation of Congress.

The items of British legislation are so numerous, and so different from one another, that it would not be well to treat them together. Yet before approaching them one by one it is practicable and desirable to notice a few of the pertinent general principles of the American constitutional system.

In the United States there is no counterpart to the unlimited power of Parliament, for the Constitution restricts each of the government's departments — judicial, executive, and legislative.

The constitutional limitations upon Congress are of several sorts. Some are stated as limitations upon Congress expressly. For example,

“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”

Others are found argumentatively. Thus the *prima facie* impossibility of delegating legislative power is deduced from the provision that

“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”

Others are part of the restriction placed upon the whole federal government. Thus,

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

Regarding all the powers given to the national government it is to be said that the Constitution, like any other document, *prima facie* is to be understood as having in mind normal life and not abnormal life — for normal life is, so to speak, its atmosphere and context. As peace and not war is normal, the Constitution, in the absence of clear words to the contrary, by its express language creating express powers is understood to intend to create only the powers requisite for times of peace. Conversely, limitations expressly imposed are to be understood *prima facie* as dealing with times of peace and not of war. Yet the *prima facie* meaning may be so enlarged as to cover the abnormal circumstance of war, in case such construction be reasonable and be not expressly forbidden.

It cannot be denied that both powers and limitations are created by implication. For example, it is by implication that we learn the existence of the national power to charter a corporation,⁵ and to take land in a State by eminent domain;⁶ and it is by implication that we learn the national inability to tax an official salary paid by one of the States.⁷

If the federal government has an incidental power to secure by eminent domain the performance of some of the functions for which it exists, is it not obvious that it has an incidental power to preserve its own existence, and that this power is at least as applicable in time of war as in time of peace? When the preamble to the Constitution says that

"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America,"

does it not indicate argumentatively, even without the aid of express provision in the Constitution, that the United States may preserve its own existence by force?

⁵ *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

⁶ *Kohl v. United States*, 91 U. S. 367 (1875).

⁷ *The Collector v. Day*, 11 Wall. 113 (1870).

One is aided in answering such questions by remembering the doctrine regarding paper money. Notwithstanding the absence of express constitutional provision that the national government may issue legal tender paper, the national government through Act of Congress may issue such paper either as an incident of maintaining the government's existence in time of war or as an incident of sovereign power belonging to all governments to which it is not expressly denied.⁸

A fortiori it would have to be held that the national government may preserve its existence by war. Yet it is unnecessary to rely on implication regarding this matter. The Constitution expressly provides that

"The Congress shall have Power . . . To declare War . . .; To raise and support Armies . . .; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States . . .; And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."⁹

Thus the power to have forces and to prosecute war is granted expressly; and, further, though such a power obviously must carry with it vast incidental powers, the existence of such incidental powers is not left to implication alone but is itself recognized expressly.

The constitutional limitations most likely to be urged regarding emergency legislation are these:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."¹⁰

"Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the testimony of two witnesses to the same overt Act, or on Confession in open Court."¹¹

⁸ Legal Tender Cases, 12 Wall. 457 (1870); *Juilliard v. Greenman*, 110 U. S. 421 (1884).

⁹ Art. I., sect. 8.

¹⁰ Art. I., sect. 9.

¹¹ Art. III., sect. 3.

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."¹²

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."¹³

"No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."¹⁴

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."¹⁵

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."¹⁶

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."¹⁷

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."¹⁸

"The powers not delegated to the United States by the Constitu-

¹² Am. I.

¹³ Am. II.

¹⁴ Am. III.

¹⁵ Am. IV.

¹⁶ Am. V.

¹⁷ Am. VI.

¹⁸ Am. IX.

tion, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁹

Let us now approach severally some of the items of the British emergency legislation.

The British government promptly, indeed even before the actual outbreak of war, took control over the transmission of messages by wireless telegraphy.²⁰ As Congress has express power “to regulate Commerce with foreign Nations, and among the several States,” and as communication is commerce, and as wireless telegraphy is a mode of communication, and as wireless telegraphy even when not used for interstate or foreign communication may be an interference with such communication, it follows, even without the express provision that Congress shall have power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,” that Congress may take control of wireless telegraphy; and, indeed, Congress took the necessary steps several years ago.²¹ In the absence of the commerce clause such legislation would be upheld as an incident of the express powers “to declare War,” “to raise and support Armies,” “to provide and maintain a Navy,” and “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,” since the legislation in question is a reasonable method of making the army and navy efficient and of preventing the transmission of intelligence to the detriment of the army and navy and to the disadvantage of the purposes for which the country maintains the army and navy.

Similarly, when, under an Act of Parliament, the British government prohibited the navigation of aircraft over the whole area of the United Kingdom, the coast-line, and the adjacent territorial waters,²² what was done was what Congress might do either under the commerce clause or under the powers incident to making war and maintaining forces, as just now outlined.

The prohibition of the export of arms and ammunition²³ would be constitutional under the clause giving Congress power to regulate commerce with foreign nations. It would also be constitutional under the clauses giving Congress power to declare war, to

¹⁹ Am. X.

²⁰ Aug. 1, 1914; *EMERGENCY LEGISLATION*, 402.

²¹ Act of Aug. 13, 1912; 37 U. S. STAT. AT L. 302.

²² Aug. 2, 1914; *EMERGENCY LEGISLATION*, 47.

²³ Aug. 3, 1914; *EMERGENCY LEGISLATION*, 160.

support armies and maintain a navy, and to make all laws necessary and proper for carrying into execution the foregoing powers; for clearly war is meant to be successful, and an army and a navy to be useful, and war could not be successful nor an army and navy useful without arms and ammunition. And so too of the prohibition of the export of provisions.

Further, it would be possible to sustain by the commerce clause the validity of part of the provisions in the British Aliens Restriction Act²⁴ for prohibiting aliens from landing and embarking, for deportation of aliens, and for requiring aliens to remain within certain places; but it would be simpler, and quite as easy, to sustain the whole of them under the war and army and navy clauses.

Similarly, it is upon the war and army and navy clauses that one would support in America the provisions of the British Act of Parliament²⁵ for requisitioning carriages, horses, vessels, aircraft, food, and stores of every description, and the provisions of later legislation expressly extending to all interferences with private rights of property for the purpose of serving the public safety. It is true that an appeal would be taken to the provision in the Fifth Amendment to the effect that no person "shall be deprived of life, liberty, or property, without due process of law"; but the seizure of property in the emergency of war is an ancient procedure, not to be overthrown by language so devoid of specification as is this. Here is a place where one must bear in mind that the due process clause of the Fourteenth Amendment — "nor shall any State deprive any person of life, liberty, or property, without due process of law" — is held not to deprive a State of the power to protect health, morals, quiet, and the like, even at the expense of restricting or destroying life, liberty, or property.²⁶ If a State may thus, notwithstanding a due process limitation, interfere with life, liberty, and property for the sake of health, morals, quiet, and the like, it follows, *a fortiori*,

²⁴ Aug. 5, 1914; EMERGENCY LEGISLATION, 6.

²⁵ Aug. 7, 1914; EMERGENCY LEGISLATION, 11.

²⁶ Bartemeyer *v.* Iowa, 18 Wall. 129 (1873) (State may prohibit use of intoxicating liquor); Munn *v.* Illinois, 94 U. S. 113 (1876) (State may regulate charges of grain elevators); Barbier *v.* Connolly, 113 U. S. 27 (1885) (Municipal ordinance may prohibit public laundry work between certain hours and within certain neighborhoods); Lawton *v.* Steele, 152 U. S. 133 (1894) (State may protect fish by destroying nets); Holden *v.* Hardy, 169 U. S. 366 (1898) (State may make an eight-hour day for underground mine workers).

that notwithstanding a due process restriction the United States may interfere with life, liberty, and property for the sake of protecting the very existence of the government itself. The question of compensation is more serious. The Fifth Amendment says "nor shall private property be taken for public use, without just compensation." As has been said, all general language must be taken *prima facie* as referring to normal life, and the normal life is peace and not war. Yet the Fifth Amendment in a preceding provision bears war in mind, saying that for infamous crimes there must be a grand jury "except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." Besides, payment for requisitions is a normal procedure. It will be urged, therefore, that the Fifth Amendment requires just compensation for requisitions. Nevertheless, it is important to recognize that the Fifth Amendment covers five topics, that these topics are not of the same sort, that the topic mentioning war is the first, that the topic regarding compensation is the fifth, and that the intermediate ones are far from having peculiar bearing upon war, though it may be admitted that they are not incapable of being applied intelligently to war as well as to peace. This will be seen clearly if with these points in mind the Fifth Amendment be read from beginning to end. After the insertion of figures to call attention to the several topics, the Amendment is this:

"(1) No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; (2) nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; (3) nor shall be compelled in any criminal case to be a witness against himself, (4) nor be deprived of life, liberty, or property, without due process of law; (5) nor shall private property be taken for public use, without just compensation."

There can be no question that the fifth topic is as a matter of mere words so stated as to require compensation for the use of a battlefield. Yet it seems reasonable to say that these words, however wide their verbal meaning, do not mean to cover takings of such an abnormal nature, but mean simply to cover takings by way of eminent domain — peaceful and normal takings. Payments for requisitions from enemies or from friends are covered by the laws of war, and

payments for battlefields and the like are covered, if at all, by specific legislative grants of indemnity; and, as it seems, the compensation which is the topic of the concluding passage of the Fifth Amendment is compensation only for takings which are normal and peaceful, especially as payment for such normal takings was not required by the common law and needed this express regulation.

Let us now pass from considerations regarding property to considerations regarding personal liberty.

Combining the British Defence of the Realm Consolidation Act, 1914, and the Regulations based upon it, one finds provisions requiring persons to remove from areas important for military or naval uses, and to refrain from liquor selling, and at certain hours to extinguish lights, and to remain within doors, and to refrain from collecting information regarding the armed forces, and to refrain from having photographic apparatus in the vicinity of naval or military works; and one must now ask what would have to be said of the constitutionality of such restrictions in the United States. The apparent way to bring them within federal power is through the war and army and navy clauses of the Constitution; for the power to have an army and a navy carries with it the power to protect the bodies and individuals constituting the forces and to do what is necessary to secure the success of their operations. Here again the Fifth Amendment would be seized, and especially the provision that no person shall be deprived of life, liberty, or property without due process of law. Due process of law includes whatever was recognized as appropriate at the adoption of the Constitution. From the point of view of due process of law, whatever is old is good.²⁷ In war times such restrictions as those named have been common and are necessary. In other words, they are appropriate; and hence they comply with the requirement of due process.

Still more clearly, it is within congressional power to provide, as in the British Trading with the Enemy Act, 1914, and its successors, that business transactions with persons resident in hostile territory shall be a misdemeanor and that the subject matter shall be forfeited; for such transactions are obviously detrimental to the conduct of war, and contrary to public policy at common law, and within the commerce clause and the army and navy clauses of the

²⁷ *Den d. Murray v. Hoboken Land Co.*, 18 How. 272 (1855).

Constitution, and not protected by the due process clause of the Fifth Amendment.

The instances of British legislation thus far discussed have been chosen as samples of the sort of problems and of the mode in which the problems would have to be met under the Constitution of the United States. To discuss the whole mass of British legislation appears unnecessary. Finally, it is also unnecessary at present to discuss whether individual States could enact similar legislation; for the important question now is simply whether the Nation can do so.

Eugene Wambaugh.

CAMBRIDGE, MASS.